Office - Supreme Court, U.S.
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JUN 6 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED,

Respondent.

BRIEF OF DONNA HYLIN, RESPONDENT, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED BY THE UNITED STATES

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QUESTION PRESENTED

Whether the widow and children of a mineworker, whose death resulted from a fatally dangerous condition created primarily by the government's negligence, that consisted in ordering a change in the work place under one mandatory inspection standard that could not safely be made without other changes that the government improperly failed to order under other mandatory inspection standards, shall be denied compensation for his death under the federal tort claims act, 29 U.S.C. §§ 1346(b), 2674, although any private individual guilty of the same misconduct would be liable under Illinois law, following the Restatement (Second) of Torts, Section 324 A, subparagraph (a).

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STATEMENT

The government actually worsened the risk of death and injury during its mine safety inspection giving rise to this case. The Seventh Circuit Court of Appeals found liability on that sole basis, not on the basis of a mere failure to detect a risk.* Thus, the only question now genuinely

* The Seventh Circuit expressly declined to base liability on plaintiff's alternative theory of a failure to detect risk and did not decide that issue. *Hylin v. United States*, 715 F.2d 1206, at 1210 (7th Cir. 1983).

presented is whether the government can avoid liability even when it affirmatively creates a hazard causing injury or death.

It is revealing of how far the Department of Justice now goes to avoid responsibility to compensate American citizens killed or injured because of the government's negligence that it acknowledges no difference between creating a dangerous condition and failing to detect one caused by others. The distinction is not lost on Hylin's widow. Her husband paid for it with his life. The record leaves no doubt that if the government had ordered no changes in the mine where Mr. Hylin worked, or had never appeared there at all, he would not have been killed. *Hylin v. United States*, 715 F.2d 1206, at 1208-1209 (7th Cir. 1983).

The change ordered was the erection of a handrail around a conveyor that had been used by workers to ride from one point to another in the mine. The handrails forced them to walk down a previously unused passageway where they had to squeeze past an electrical junction box containing deadly defects, such as partly uninsulated wires, a lid that lacked effective means to keep it closed, and holes in the lid where the uninsulated wires had contacted it and caused a short circuit. Although a mandatory standard, 30 C.F.R. § 55.9-7, required the government inspectors to order a handrail or an emergency stopping device (in this mine, an emergency stopping device was impossible because it would have shut down the mine), the government inspectors ignored the mandatory standards set forth in 30 C.F.R. §§ 55.12-8, 55.12-13, 55.12-30, and 55.12-32 (1976) requiring elimination of the several electrical defects in the junction box. Furthermore, they ignored the mandatory instructions in their own Mine Enforcement and Safety Administration manual that "[a]n inspector shall consider his action during the inspection

and shall not create a dangerous situation in enforcing compliance with a standard." *Hylin, supra,* 715 F.2d at 1208-1209, 1213. The changes required to eliminate this fatal hazard were no less mandatory than the change that created it. No discretion was required.

Therefore, this case presents no issues in common with *United States v. S. A. Empresa De Viacao Aerea Rio Grandense (Varig), cert.* granted No. 82-1349 (May 16, 1983), or *United States v. United Scottish Insurance, cert.* granted No. 82-1350 (May 16, 1983). Neither *Varig* nor *United Scottish* involved any negligent enhancement of the risk, such as will establish liability in those states, including Illinois, that follow the Restatement (Second) of Torts, Section 324 A, subparagraph (a). Nor does this case involve any "discretionary function" such as the government contends was involved in *Varig* and *United Scottish.*

Only insofar as any issue is raised in *Varig* and *United Scottish* by the Justice Department's—most extreme—contention that, in conducting regulatory inspections, the government has absolute immunity from federal tort claims act liability, no matter what the character of its negligence, does this case have an issue in common with those cases. However, decision of *Varig* and *United Scottish* does not require reaching that issue, if indeed it is an issue; moreover, resolving it in the Department's favor would require overruling of *Dalehite v. United States,* 346 U.S. 15 (1953), if not also *Indian Towing Co. v. United States,* 350 U.S. 61 (1955).

The harshness and unsoundness of this most extreme contention is apparent from the Justice Department's own unwillingness to confront the consequences of it directly. Even while urging, in *Varig* and *United Scottish,* the abolition of liability for all regulatory inspection activity,

the Department is unwilling to say that *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973) (where an inspector ordered a fuel line modified in a way that caused it to become dangerous), is ill-founded. Instead, the Department tries to factually distinguish this case from Arney, (*cert.* pet. p.6, fn.4).

The distinction the Department of Justice draws is specious. It argues that, in *Arney*, the inspector ordered the fuel line modified in a way that made it dangerous; whereas, in this case, "The handrails that were installed pursuant to the Notice of Violation were not inherently dangerous and did not by themselves cause any injury." Obviously the handrails alone did not kill Hylin. They simply forced him to walk into an electrical death trap that the government inspectors were admittedly qualified to recognize but he was not.

Justice Department counsel are urging the same kind of tunnel vision as that exercised by the government mine inspectors who ordered the change resulting in Hylin's death. Such a contention is not compatible with the tort law of a single jurisdiction in the United States and well illustrates the Department's purpose to emasculate the federal tort claims act. The act was intended by Congress to impose on the federal government—with very few exceptions—the same legal responsibility for tortious misconduct that state law places on private individuals, not to place the government above the law and leave American citizens uncompensated for death or injury the government causes. The exceptions to the act are carefully and narrowly drafted to exclude only policy-making activities and a limited number of other specified activities for the misconduct of many of which there have existed other, if more limited, remedies. None of the exceptions

depends on artificial distinctions thoroughly repudiated under the law of every state, to which the act purportedly subjects the government on the same even-handed basis as other American citizens.

But the Department's efforts to distinguish this case from *Arney, supra,* and to put it under the umbrella of *Varig* and *United Scottish,* are not confined to comparing what the Courts of Appeal in these cases held and said. The Department goes outside the record presently before this Court to argue that:

> "The court of appeals stated that the inspectors 'observed [the junction box] and saw its dangerous condition' (App., *infra,* 3a; see also *id.* at 21a). However, the court did not cite any evidence to support this assertion, which is directly contrary to the findings of the district court (see *id.* at 39a). See page 6, *supra.* In fact the court of appeals' statement is not supported by anything in the record; there is no evidence that the inspectors either examined or were cognizant of the condition of the box at the time they issued the Notice of Violation with regard to the conveyor belt." *Cert.* pet. p.8, fn.3.

It is surprising that the Department of Justice seeks review in this Court of what essentially is a question of fact, even while stating: "We do not seek review here of the decision below that the district court clearly erred in finding that the inspectors' actions were not the proximate cause of respondent's injury [because] this determination is essentially factbound and presents no issue in common with any contention in *Varig* or *United Scottish.*" *Cert.* pet. p.11, fn.6. It is difficult to see how the question whether this case resembles *Arney* rather than *Varig* or *United Scottish* is less factbound than the issue of proximate cause. If the Seventh Circuit's version of

the facts is accepted rather than that of the Department, then, by the Department's own admission, the Seventh Circuit's imposition of liability for the creation of new dangers by actors who intermeddle, "may [as in *Arney*] be apt." *Cert.* pet. p.12.

However, since the Department of Justice has seen fit to disregard its own precept of not seeking review of a factbound issue, and has gone outside the record presently before this Court to argue the factbound issue, it appears appropriate for respondent to call the Court's attention to those portions of the record which fully support the Seventh Circuit's discussion of the facts. The Department of Justice notes that the government's mine inspectors conducted a safety inspection of the mine on February 10 and 11, 1977, *cert.* pet. 4, but distorts or omits several other important details.

First, the Department deceptively states that "the inspectors cited the mine owner for a violation of 30 C.F.R. pt. 55.9-7, the mandatory standard requiring that all unguarded conveyors be equipped with emergency stop devices . . ." but simply "*permitted*" the mine owner to abate the violation through the installation of a handrail because of the impracticality of an emergency stop device, *cert.* pet. 5. Actually, the regulation in question, 30 C.F.R. pt. 55.9-7, *required* a handrail or an emergency stop device, wherefor the government inspectors, in ordering an abatement, knowingly compelled the erection of a handrail because of the impossibility of using an emergency stop device. There was no discretion involved.

Second, the Department fails to mention that the government inspectors were present not only on February 10 and 11, 1977, but also on a follow-up inspection conducted on March 1, 1977, *Hylin, supra*, 715 F.2d at 1208.

Third, the Department erroneously states "It is not clear from the record how long the junction box had existed in this defective condition" that it was in when Hylin was electrocuted, *cert.* pet. p.4. The record is clear that the junction box was in the defective condition on and long prior to the February 10-11, 1977, inspection, although the exact length of the time preceding that inspection was not known (A1-A3).

Fourth, contrary to the Department's assertions, *cert.* pet. 8, fn.44, and p.9, fn.4, the evidence very clearly establishes that the government inspectors had seen and could not have mistaken the defective condition of the junction box. The deadly hazard that they themselves had created, by compelling the erection of handrails that forced workmen to walk past the junction box, was readily foreseeable to the government inspectors.

On February 10, 1974, Inspector Guthrie saw the junction box lid open and commented that it should be closed. But he issued no citation (A3-A6). Inspector Johnson testified at trial that he did not recall seeing the junction box but was impeached by his deposition testimony that he had seen the box but didn't notice the holes in it (A6-A9). Inspector Guthrie admitted that, during the February 10-11, 1977, inspection, he had to walk down the passage directly past the junction box, which partially obstructed his travel (A4-A6). Ronald Hollenbeck, the chief sub-regional inspector who was the superior of Guthrie and Johnson, testified that he could conceive of no reason why the violations of the junction box found in the post-accident investigation should not have been discovered before the accident by the MESA inspectors (A9). The District Court Judge himself stated, that the junction box was plainly there to be seen and he could hardly conceive of how anyone could fail to see it (A9-A10).

It should also be noted that the Department's *certiorari* petition does not accurately reflect other pertinent evidence on which the Seventh Circuit relied, including evidence not disputed. The Department devotes about 8 of the 12 pages of its petition to summarizing the Seventh Circuit opinion, although the opinion is of modest length and requires little if any explanation. Respondent respectfully urges that the opinion itself is a far more reliable guide than the Department's "statement" concerning what the Seventh Circuit held and said. The Department also unduly emphasizes, at *cert.* pet. p.7, the Seventh Circuit's reliance on the Ninth Circuit's decision in *United Scottish Insurance Co. v. United States*, 692 F.2d 1209 (1982), *cert.* granted, No. 82-1350 (May 16, 1983). Each of the Seventh Circuit's citations of *United Scottish*, (*Hylin, supra*, 715 F.2d at 1210, 1211, 1213, 1214), supports a well-established proposition for which numerous other decisions could easily have been cited. It was never cited as essential authority or suggested to involve similar issues. On the contrary, the Seventh Circuit specifically held that both *United Scottish* and *Varig* involved different issues, *Hylin, supra*, 715 F.2d at 1211, including fn.5.

REASONS AGAINST GRANTING THE PETITION

Unless this Court is prepared to hold that the federal tort claims act preserves "sovereign immunity" for the federal government when American citizens are killed or maimed through hazards created by the affirmative misconduct of government safety inspectors, then the Court's decisions in *Varig* and *United Scottish* will have no effect on the validity of the Seventh Circuit's decision in this case and there is no reason to grant the government's *certiorari* petition or hold it until *Varig* and *United Scottish* are decided.

Short of such an unmerciful interpretation of the act, the only other basis the government advances for relief is, in effect, for the Court to circumvent the foregoing question by overruling the factual determinations below or drawing tort law distinctions between commission and omission for the federal government that have been rejected for private individuals in the common law of every state in the nation. It is not clear that the government even desires that its petition should be granted for purposes of a full review on the merits. The implication of the government's request that its petition "should be held pending the Court's decision [in *Varig* and *United Scottish*]" is that, following the decisions in *Varig* and *United Scottish*, the Court should summarily remand this case to the Seventh Circuit for further proceedings consistent with the Court's *Varig* and *United Scottish* decisions. That would amount to a rebuke, if not a reversal, of the Seventh Circuit for its factual determinations, while depriving respondent of a full review on the merits. It

is respectfully submitted that a summary disposition based on the government's factual representations would be ill-founded and prejudicial to respondent and that neither a summary disposition nor a full review of the factual determinations could be of sufficient precedential importance to warrant granting or holding the government's *certiorari* petition for any purpose.

The federal tort claims act, 28 U.S.C. §§ 1346 (b) and 2674, is humane legislation designed to eliminate the injustices in the private compensation bill process and to place the federal government, so far as possible, on the same plane of responsibility—neither above nor below the law—as other Americans for tortious misconduct. It is shocking that the Department of Justice now urges the Court to directly or indirectly decide cases arising under the act as if it were designed to preserve impunity even for the fortunately rare instances where government inspectors, in the guise of protecting life and safety, become the agents of injury or death.

While other types of tort cases may have been of primary concern to Congress when the act was adopted, federal regulatory enforcement activities existed then, and long before then, and there is no basis for the suggestion that, in enacting the several carefully-worded exceptions to the act, which appear in 28 U.S.C. § 2680, Congress did not intend liability for tortious misconduct in the course of government inspections falling outside these exceptions. There is nothing in the act to support such a suggestion.

The gist of the Justice Department's position seems to be that, when the act imposes liability under circumstances where the government would be liable "if a private person," 28 U.S.C. § 1346 (b), or "to the same ex-

tent as a private individual," 28 U.S.C. § 2674, these phrases were intended to create another exception, cryptic and apart from those in 28 U.S.C. § 2680, and as broad as most of them combined, that eliminates the remedy for large segments of the government's business.

Both these phrases are missing verbs that must be implied for the phrases to have meaning. The Justice Department apparently is suggesting that "if a private person" should be viewed as saying "if [the United States *is*] a private person" rather than saying, as would seem to make more sense, "if [the United States *were*] a private person." As a matter of semantics, as well as of sound federal policy, liability should depend not on whether the government activity in question happens to be emulated in the private sector but on whether, if a private individual were to engage in the same activity, that individual would be liable. Of course the federal government exists only to do what private individuals and state governments are thought to be unable to do or do as well. Often the federal government preempts private or state action. To argue that the phrase "if a private person" was intended to paralyze the tort claims remedy whenever the government does what it mainly exists to do and private persons are unable to do, reflects an extremely dim view of Congress' purpose and methods in adopting this humane legislation.

But no matter how narrow a view is taken of the affirmative duty of a federal safety inspector to discover defects in a private workplace, no matter whether it is a primary or a secondary duty or whether it extends to the worker in the premises or only in some general sense to the public, one thing is clear: in no sense does any federal statute or regulation authorize or require a federal safety inspector to increase the danger of death or

injury or relieve a federal safety inspector of the common law duty generally embraced by the federal tort claims act to refrain from negligently inflicting harm on others through misconduct not authorized or required by any federal statute or regulation. Least persuasively of all can it be argued that an exception from tort claims act liability should be judicially recognized for affirmative misconduct of government safety inspectors violating the express requirements of the federal laws under which their inspections take place. The misconduct proved here was affirmative, deadly, and contrary to the non-discretionary requirements of the federal regulatory laws involved. Neither *Varig* nor *United Scottish* warrants a decision disturbing the Seventh Circuit's disposition of this controversy.

CONCLUSION

The government's petition for a writ of *certiorari* should promptly be denied, there being no reason to expect that the Court's decisions in *United States v. S. A. Empresa De Viacao Aerea Rio Grandense,* No. 82-1349, or *United States v. United Scottish Insurance,* No. 82-1350, should or will affect the outcome of this case.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM DIRECT EXAMINATION OF RISTOKRAT MINE MANAGER GEORGE McMAHON ON NOVEMBER 4, 1981

Q Can you tell us how long that box had been in place?

A I suspect from when the plant was built in about 1925.

Q Was it there from all the time you were there, from 1950 on?

A Yes.

Q I will ask you if you would look at this Exhibit 67. Does that appear to be the box involved?

A Yes, it does.

Q Do you see in this Exhibit 67 in the lid, a couple of holes there?

A Yes.

Q Do you have some knowledge, Mr. McMahon, of when and how those holes were formed?

A Yes. We had some problems with that box eight or ten years ago and as I remember it, the electrician, the man we had as a Head Maintenance Man had to wire and right now I can't remember whether it was our—we had Clair Harvey and Geno Rigari and I don't remember whether Clair had retired at that time or whether Geno had fixed it but there had to be some tape put on the wires at that point.

Q When you say about eight or ten years ago, was that some years prior to the accident to Donald Hylin?

A Yes, probably maybe 11 years now because that was—

Q All right. And were the holes in that lid formed at that time?

A Yes, there was holes in there.

Q Do you know of any other problems with that box in the meantime, between that incidence some eight or ten years before the accident to Hylin and the date of his accident in September, 1977?

A No, I don't.

Q And who was it that actually—I think you told us, was it an employee of Ristokrat that actually did the repair some eight or ten years before?

A Yes.

Q And after that repair was done, was the condition of the wires as they enter at the top of the box on the right, was that the same as shown in this Plaintiff's Exhibit 10?

A Yes, I presume so, yes.

Q Well do you know of any changes in that box from that time back when one of your maintenance men made the repair, to the time of the occurrence involving Donald Hylin?

A No.

Q So is the condition of the box as we see it here in this photograph, Exhibit 10, the box itself, the same condition as it was back eight or ten years ago right after the repair?

A I believe so, yes.

Q Now during the intervening years and between the time that somebody at the plant made that repair and the incident involving Donald Hylin, were there any MESA inspections of that conveyor room?

A Yes.

Q And were those inspections periodic at least once a year and several after that each year?

A I can't recall the number of times and I don't have that but they did come, I would say, twice a year, I think they were there.

Q During each of those inspections, were the holes in the box as you see them here today?

A They would have been there, yes.

Q During each of those inspections, were the wires in the condition that you see here in this Exhibit 10?

A Yes. Yes.

* * *

Q Do you know who it was that actually talked to you about the barricades or the lanyards?

A I think it was Mr. Guthrie that did that.

Q And did you understand that as a result of that citation, you had to put up a barricade?

A We had to do something, yes.

Q Now you mentioned a few moments ago something about an inspector saying something about a box. Did that occur during this inspection?

A Yes. Well, we were standing on the other side of that box and he said, "Well that should be—" He said, "That door should be closed on there."

Q Now when you say "we" who was standing there, first?

A Well, this was Mr. Guthrie.

Q That is what I want to get first. Was it you and Mr. Guthrie?

A Yes, right, sir.

Q Okay. Where were you standing?

A Well, it would be on the other side of that far side where the clay went down.

Q Pointing to Plaintiff's Exhibit 11?

A Yes.

Q And on the far side of the chute, that is in the back side of the picture, the far distance in the picture?

A Yes.

Q All right. And what were you standing on?

A Well, I believe you can see it better in the other picture.

Q Tell us where it was.

A We were just standing there where that incline starts up.

Q And what, actually, did Mr. Guthrie say to you?

A He says, "That lid on that box should be closed."

Q Did Mr. Guthrie then walk down and make any inspection of that box?

A No.

Q Did he write you any kind of a notice or citation about it?

A No, sir.

Q Did he tell you there was anything defective or dangerous in that box?

A No.

* * *

EXCERPT FROM ADVERSE EXAMINATION OF GOVERNMENT INSPECTOR JOHN GUTHRIE ON NOVEMBER 4, 1981

Q When you went in there, were you focusing your attention on the conveyor?

A Yes, sir, I was.

Q Did you know when you went in that room it was your obligation to inspect all other parts of that room?

A Yes, sir.

Q Did you make an inspection of all the other parts of that room?

A Yes, sir, I did.

Q Do you know where you entered the room from?

A Yes, sir. I came in from the grinding room area, I believe, sir, and the reason I am not real sure is it's pretty hazy, and I went back to the plant yesterday to refresh

my memory on that to try to bring—you know, as much memory back as possible, and it's my assumption that I came in from the grinding room area and was at the steel pulley end of the conveyor first.

In other words, the conveyor is at an incline, and I believe at this time that I probably went from the tail end of the conveyor up the ramp rather than around the steps and down the ramp.

Q I follow you. When you say the "tail end," you mean the end as we look at those Plaintiff's Exhibits 11 and 14, that would be facing us outside the picture here?

A Yes, yes.

Q All right. And then the conveyor, as you understood it, would turn and would run away from you toward the incline?

A Yes, and it was the distance out and then it would start going up.

Q Going out there yesterday help you?

A Yes, sir.

Q So it's your best recollection today that you came in through the grinding room to the tail end?

A Yes, sir.

Q What did you do? Did you go down the right side and make any kind of inspection?

A I started over to the—went through the doorway. There is a doorway back this way a ways, and I came through the doorway first and started checking the tail pulley. We are cognizant of head pulley and tail pulley guarding, and that was probably the first thing I looked at would be the tail pulley and making sure it was properly guarded, and I don't remember whether I saw anything in guarding this or not but evidently not because I didn't write anything. Had I seen something, I would have written it, but I continued on and I started to go up on the outside which would be to our right here.

Q On the right side of Exhibit 14 here?

A Yes, and I noticed the obstruction at that point and went back and went under some chutes and stuff looking at the conveyor.

Q What other things did you go around when you went under those chutes?

A Sir, in all honesty, I can't remember. Having looked at it yesterday, there were several things in there that one would have to duck or move out of the way of in order to make progress further. As of the inspection, the original inspection, it's very, very hazy in my mind, and I really can't remember from that exactly what—all the things, but looking at it from yesterday, there was the chute, there was no box there at the time I looked at it yesterday, but there was the imprint of the box so I assumed the box would have been in the road and would have been part of my obstruction, too.

* * *

EXCERPT FROM ADVERSE EXAMINATION OF GOVERNMENT SAFETY INSPECTOR DONALD JOHNSON ON NOVEMBER 4, 1981

Q Good morning, Mr. Johnson.

A Good morning.

Q I think as we left off yesterday, I think I had asked you whether or not you had seen the box out there at any time prior to the accident involving Donald Hylin and your answer is you had not?

A That's right.

Q Let me just ask you, referring to your deposition, do you remember that having been taken?

A Yes, sir.

Q I refer to Pages 79 and 112 and I will ask you if you remember this question and answer being given in 1979:

"Q Now you have indicated that you had been in the room during your inspections at times before Mr. Hylin died. Did you ever see the junction box there, to your recollection?

A Yes, sir.

Q Well, I take it if you looked at it, that you would have done so with a view toward performing your duties there, would that be a fair statement?

A Yes, sir."

Now on Page 112—

A Are you talking about the room in which Mr. Hylin was hurt?

Q Yes, sir. On Page 112:

"Q I'm speaking of February of 1977 on up to September of '77 or any time before February of '77.

A Well, I observed a box prior to the accident during my inspection and before that. It had the cover in a closed position.

Q Did it have any clips on it when you saw it?

A I don't remember, sir."

And it goes on and at that point we say:

"Q Did you ever see any holes in the lid?

A No, sir."

And you went on to say there that you did not see any holes in the lid of the junction box when you saw it at this time prior to the inspection after Donald Hylin's death. Is that what you recall, Mr. Johnson, that you saw the box before his death?

A It was a question that I answered previously, that of February?

Q Yes, sir.

A I never seen the box in February, sir. I might have seen it before but I never seen it in February.

Q If you saw it before February, it would have been on some inspection, would it not, that you had made out there, from the time that MESA started in 1972 and you started in '74 making those inspections?

A It would have happened then, yes.

Q In those years, it is your testimony that you looked at that box but you didn't see holes in it?

A That is the way I recollect it.

Q Now if you saw holes in that box, that would be a mandatory violation because it would be a partial cover and that wouldn't be satisfactory, is that right, sir?

A I would have to investigate it if I saw a hole in the box, to relate that maybe something was amiss. If the holes were there and it had a cover inside behind the cover, I would have to ask somebody to bring it to their attention and see if there was something wrong. I would dig into it or look into it.

Q Now let me ask you these questions then from your deposition again, Pages 118 and 119:

> "Q The presence of the junction box lid was the question. The presence of the junction box lid that has holes in it is a violation in and of itself of the standards, isn't it?
>
> A It is a violation in the fact it is not in proper order.
>
> Q It is a violation of MESA's Electrical Mandatory Standards, isn't it?
>
> A It is not in custom with good electrical wiring practices."

Then there is some colloquy and the question:

> "Q Don't MESA standards, without my taking the time to go over them and I will if need be, require that junction boxes and electrical connections be covered?

A Yes, sir.

Q And I assume that means a cover that doesn't have holes in it, doesn't it, because that is a partial cover?

A Yes, sir."

Does that help you to recall that a box with holes in it would be a mandatory violation?

A I follow that statement, yes.

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EXCERPT FROM THE DEPOSITION (PLAINTIFF'S EXHIBIT A AT TRIAL) OF GOVERNMENT SUB-REGIONAL CHIEF RONALD HOLLENBECK ON MAY 15, 1979

Q Did you review the investigation report yourself?

A Yes.

Q Did you see any reason, sir, why the violations of mandatory standards that were found in the post accident investigation should not have been discovered before the accident happened by MESA's inspectors?

A Will you repeat that, please?

MR. DAVIDSON: Please read it.

(Whereupon said question was read back.)

THE WITNESS: No.

MR. DAVIDSON: Nothing further.

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COLLOQUY BETWEEN PLAINTIFF'S COUNSEL AND THE COURT ON NOVEMBER 4, 1981

MR. PATTERSON: Your Honor, it is not agreed that it wasn't seen. It is not agreed it wasn't seen by this man. The box was there to be seen. As your Honor noted earlier in this case, we had testimony from Mr. McMahon

that it actually was seen in an open condition and I submit to the Court there is no way a man could go by there and not see that box.

THE COURT: Now wait a minute now. Then the nature of the case—I think with that statement, this case turns into something else. Do you mean to say it is the plaintiff's theory of the case that these inspectors saw the box—and what did they do?

MR. PATTERSON: That they ignored it, that they saw the box and they simply walked by it and paid no attention to it and they should have seen it.

THE COURT: All right. That is a difference of degree. They saw the box and ignored it.

MR. PATTERSON: Exactly.

THE COURT: Mr. Guthrie was under oath and he says he didn't see it. Mr. Beavers who testified under oath said he didn't see it. Mr. Stachowiak who testified under oath said he didn't see it.

I will be candid with you. I don't know how anybody could be there and not see that box.

MR. PATTERSON: Correct.

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